Neutral Citation Number: [2021] EWHC 436 (Ch)

Case No: CR-2020-004089

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

7 Rolls Buildings, Fetter Lane
London EC4A 1 NL

Date: 25 January 2021

Before:

Mr Justice Miles

IN THE MATTER OF SEABROOK ROAD LIMITED

Between:

(1) SECURITY TRUSTEE SERVICES LIMITED
(2) KEVIN MERSH
(3) MATTHEW NAGLE
(as receivers of the freehold property known as Seabrook Heights, 69 Seabrook Road, Kent)

Applicants

- and -

SEABROOK ROAD LIMITED

Respondent

MR C BOARDMAN QC, instructed by Katten Muchin Rosenman UK LLP, appeared on behalf of the **Applicants**
MR R HOCKING, instructed by Furley Page LLP, appeared on behalf of the **Respondent**

Hearing date: 25 January 2021

APPROVED JUDGMENT

MR JUSTICE MILES:

1. This is the hearing of an application made under the Insolvency Act on 13 January 2021 by Security Trustee Services Limited (STS) and Kevin Mersh and Matthew Nagle, as receivers of property owned by the Respondent, for orders that (1) the notices of intention to appoint an administrator dated 27 November 2020 (the first NOITA) and 10 December 2020 (the second NOITA) be removed from the court file; (2) the appointment of Mr Mersh and Mr Nagle as joint receivers of the freehold property known as Seabrook Heights, 69 Seabrook Road, Kent, the property be declared valid; and (3) notwithstanding the filing of the first and second NOITAs, the appointment and subsequent actions of Mr Mersh and Mr Nagle as joint receivers of the property shall be permitted.

2. The application was served on the respondent, Seabrook Road Ltd (Seabrook) on 18 January 2020. Seabrook has appeared on this hearing by counsel but takes a neutral stance in relation to the application.

3. The application is supported by two witness statements of Mr Johnson of the applicant solicitors, dated 11 January 2021 and 20 January 2021 respectively. No evidence in answer has been served.

4. The evidence shows the following. A facilitation agreement was entered on 15 August 2019 between Seabrook and Retail Money Market Ltd, known as "Ratesetter", and STS for the refinancing of the property development called Seabrook Heights ("the Property"). STS acted as agent and security trustee for Ratesetter. Seabrook gave a charge over the property by way of legal mortgage and a floating charge over what were called "the chattels". That charge was dated 16 August 2019.

5. The facilitation agreement was due to expire on 15 August 2020, but it was extended by agreement between the parties reached on 30 July 2020 until 15 November 2020. Seabrook failed to pay the monthly instalments of interest for August, September, October and November 2020 on time.
6. Seabrook proposed various refinancing steps and there were extensive discussions between the parties in relation to a possible refinancing. In the end, those did not result in an agreement, but it is relevant that in the context of those discussions, Seabrook repeatedly made clear that it intended to repay the amounts due under the facilitation agreement in full. It was seeking further time to do so.

7. In the course of those discussions, on 12 November 2020 Seabrook sent communications saying that it wished to avoid administration, which was treated as a last resort and wanted to propose what it called a recovery plan. Thereafter, it continued to seek to agree an extension of time for the repayment of the sums due under the facilitation agreement. As I have said, in the end those negotiations failed to bring about an agreement.

8. On 16 November 2020 a default and demand letter was sent declaring the charge to be enforceable and stating that if Seabrook failed to pay the outstanding amounts, STS would commence recovery proceedings. Further discussions took place until 4 December 2020. And it appeared at one point that agreement might be possible, but in the end, the conditions required for that agreement were not met.

9. On 7 December 2020 STS appointed the receivers. As receivers of the property, they notified the company, Seabrook, the same day. Later that day Mr Allen, an insolvency practitioner, told them and STS that Seabrook had filed a NOITA (that is to say a notice of intention to appoint an administrator) with the court on 27 November 2020. This was the first that Ratesetter or STS knew of any such notice.

10. The notice stated that it was being given to STS in accordance with paragraph 26 of schedule B1 to the Insolvency Act 1986. This had not in fact happened. Although the notice made clear that Seabrook understood that STS was a qualifying floating charge holder, no notice was given to STS.

11. The solicitors for STS and the receivers pointed this out and contended that the 27 November 2020 notice was of no effect because it had not been served as required by the rules and/or was an abuse of process. The respondent, Seabrook's solicitors ultimately responded in an email on 11 December 2020 saying that the respondent, Seabrook, acknowledged the appointment of the receivers. That email did not address the non-service of the notice by STS.

12. On 15 December 2020 the receivers' solicitors said an application to the court was necessary as the 27 November 2020 notice potentially created difficulties: there might be a challenge to the validity of the receivers' appointment, and this might make it more difficult for the receivers to carry out their functions. They said that an application would be made to the court and asked for confirmation that Seabrook's solicitors would accept service.

13. On 21 December 2020 Seabrook's solicitors agreed to accept service. They also disclosed, for the first time, the existence of a second NOITA dated 10 December 2020. That again stated that STS was being given notice in accordance with schedule B1, which again did not happen. It will be noted that this notice was sent after the appointment of the receivers, which had taken place on 7 December 2020. On 23 December 2020 Seabrook's solicitors agreed to take no steps to appoint an administrator pursuant to the second NOITA.

14. The proceedings were commenced on 13 January 2021 and Mr Johnson put in his first statement. It subsequently turned out that (unknown to the Applicants) two further NOITAs had been purportedly served by Seabrook, one on 3 November 2020 and another on 16 November 2020. Again, neither was notified to STS. Nonetheless, it has been clear throughout to Seabrook that STS was a qualifying floating charge holder and that therefore, notice had to be given to it.

15. Schedule B1 to the Insolvency Act allows a company to appoint an administrator. In particular by paragraph 22: "A company has power to appoint an administrator out of court." Paragraph 26 obliges a person who proposes to make an appointment under paragraph 22 to give at least five business days' written notice to any person, who may be entitled to appoint an administrative receiver or administrator under paragraph 14.

16. Paragraph 27 obliges a person that gives notice of intention to appoint under paragraph 26 to file with the court as soon as reasonably practicable, a copy of the notice given under paragraph 26 and any document accompanying it. Paragraph 28 prevents an appointment being made under paragraph 22 unless the person who makes the appointment has complied with the requirements of paragraphs 26 and 27 and the

period of notice specified under 26 has expired or each person to whom notice has given under paragraph 26 has consented.

17. Paragraph 29 obliges a person who appoints an administrator to file with the court a notice of appointment and such other documents as may be prescribed.

18. Paragraph 33 provides that if all the requirements of paragraph 29 are satisfied and the company enters administration by virtue of an administration order on appointment under paragraph 14, the appointment under paragraph 22 shall not take effect.

19. Paragraph 35 enables a streamlined procedure for administration applications by qualifying floating charge holder (a "QFCH"). Paragraph 36(2) enables a QFCH to have a specified person appointed as administrator instead of another's nominee wherein an administration application is made.

20. Paragraph 44 provides for an interim moratorium in terms of paragraphs 42 to 43 to arise from the time when the copy of notice of intention to appoint an administrator is filed with the court under paragraph 27(1) until (a) the appointment takes effect or (b) the period specified under paragraph 28(2) expires. Paragraph 43(2) states that when the moratorium applies, no step may be taken to enforce security over the company's property, except with the permission of the court.

21. In *JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd* [2018], 1WLR 24, [2017], EWCA CIV 276, the Court of Appeal held that in order to give a notice under paragraph 26 of schedule B1, the person had to propose or intend unconditionally to make such an appointment. A conditional proposal or intention to appoint an administrator neither entitled nor obliged a company to give a notice under paragraph 26. Therefore, a NOITA given by a person entitled to appoint under paragraph 14 was not validly given, nor had a copy of it been validly filed with the court, with the result that the interim moratorium had not been validly invoked and that accordingly, a copy of the NOITA would be removed from the court file. That was a case in which the NOITA was in fact given to the qualifying floating charge holder in accordance with the rules. The court held that the intention to appoint an administrator which was conditional on a CVA not taking effect was not a valid intention for the purposes of paragraph 26 of schedule B1.

22. The present case is stronger than that in (at least) this respect. The notice to the qualifying floating charge holder was not given in either of the two NOITAs which are in issue on this application (nor indeed in the two earlier ones). There has been no explanation for this. On the face of it, it is a serious and inexcusable breach on the rules. The relevant NOITA forms refer to the need to provide notice to STS and, indeed, the forms as completed stated that notice was being given that was not true. That alone to my mind renders the notices an abuse of process.

23. As the Court of Appeal explained in *JCAM*, the procedure contains important protections for the qualifying floating charge holder. The purpose of giving notice to such a charge holder is to enable it, if it so considers fit, to appoint its own administrator. The requirement of prior notice is therefore an important check or balance in the process under schedule B1 before a company may itself, in those circumstances, appoint an administrator.

24. Equally, the interim moratorium imposed by paragraph 44 presupposes, in circumstances of a case like the present, that notice has been given to the qualifying floating charge holder. If that is not done, the company is unable effectively to protection itself against that floating charge holder and that is contrary to the scheme of the Act.

25. I therefore consider that, on that point alone, the notices constituted an abuse of process. But the matter does not rest there.

26. As the Court of Appeal explained in *JCAM*, a notice may only be given under paragraph 26 if the company has a genuine and settled intention to appoint an administrator.

27. In the present case, I am satisfied that the company did not have such an intention at the time of the two notices which are in issue or indeed, at the time of the two earlier notices. I have already mentioned that on 12 November 2020, the company represented that administration was a last resort and it wished to propose a recovery plan.

28. Thereafter, up until 4 December 2020, there continued to be negotiations between the parties which were all directed to seeking some form of further time or indulgence by the lender. During that period, there was never any suggestion that the company intended to appoint an administrator. The proof of the pudding is also in the eating. No attempt was ever, in fact, made to appoint an administrator, notwithstanding the various notices.

29. When the receivers' solicitors stated in correspondence that there appeared to be no intention to appoint an administrator, there was no response. Mr Johnson has put in two witness statements which state in terms that it appears clear that the company never had any intention to appoint an administrator at the time it had filed the copies of the notices in court. That evidence has not been answered or contradicted.

30. It appears to me clear that the notices were served in an attempt to obtain a moratorium and to arm the company with an argument against the appointment of the receivers or indeed, steps being taken by Ratesetter to enforce the facilitation agreement.

31. The timing of the various notices strongly supports the inference that what was really being done was to give the company leverage in negotiations. It is particularly striking that the second of the two notices was only filed in court after the receivers had already been appointed. It seems to me very improbable that at that stage, there could have been a genuine intention to appoint an administrator and it seems to me clear that it was just part of an attempt to seek some sort of negotiating position even late in the day.

32. For all of these reasons, I am satisfied that there was never the necessary intention required before a valid notice may be given under paragraph 26. I am also satisfied that the notices which were filed in court were not valid notices. And that the interim moratorium, which result from such notices, if valid, never came into effect. I am also satisfied that it is appropriate to order that the copy of the NOITAs be removed from the court file and to grant the other relief that I referred to at the outset of this judgment.